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Blake A. Field VS Google, Inc.

Doc. 16

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BLAKE A. FIELD, Plaintiff, vs. GOOGLE, INC., Defendant.	No. CV-S-04-0413-RCJ-LRL **GOOGLE INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S COUNTERCLAIMS AND PORTIONS OF DEFENDANT'S ANSWER**
AND RELATED COUNTERCLAIMS.	

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I. INTRODUCTION

Pro se Plaintiff Blake A. Field ("Field") filed the present motion to strike portions of Defendant Google Inc.'s ("Google") Answer, Affirmative Defenses, and Counterclaims. Field seeks to strike, *inter alia*, *all* of Google's affirmative defenses and *all* of Google's counterclaims. The motion is badly flawed and does not come close to satisfying the burden required to justify such drastic relief.

II. BACKGROUND

Google And Its System Cache

Google maintains an online index of web sites and other content, which it makes available for free to anyone with an Internet connection. Its automated search technology helps people obtain nearly instant access to relevant information from a vast online index. To create this index, Google's search technology "crawls" the World Wide Web ("Web"), visiting Web pages to which other pages are "linked." Google copies these pages and analyzes their content so that it can properly locate the page within its index. When a user queries the index, Google returns a Search Results Page containing links to (and excerpts from) those pages it believes are relevant to the user's query. *See* Declaration of Alex Macgillivray, ¶¶ 2-5.

Google's Search Results Pages often also include links to saved or "cached" copies of the pages it analyzed when it last crawled those web pages. The cached versions of pages can serve a variety of functions for users. For example, the cached version of a page is available to users even if, due to technical problems, the original page cannot be reached. By offering access to the cached versions of the indexed sites Google thus helps improve access to content on the Internet. The cached version of a page also provides an archival view of pages as they existed at the time Google's search technology last analyzed them. Thus, the cached versions can be used to identify changes made to the pages since Google most recently crawled them.[1] *Id.*

Since it began operating roughly five years ago, Google has respected relevant Internet standards concerning its operation of its system cache feature. In particular, if a Web site makes clear that it does not wish to have its pages included in Google's cache by coding the pages using

[1] This is by no means an exhaustive list of the many purposes that can be served by Google's system cache. The examples are offered merely to provide illustration.

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a well-known "metatag" recognized by automated "crawlers," Google will not make the page accessible through its cache. The procedure for preventing the access to a page through Google's cache is clearly set forth on Google's Web site at http://www.google.com/webmasters/3.html#B2. Google also promptly removes access to pages through Google's cache upon request of the page owner. *See* http://www.google.com/remove.html#uncache. *Id.*

Field's Contrived Claim for Copyright Infringement

By this action, Plaintiff Field seeks to challenge the propriety of Google's system cache. Indeed, Field appears to have deliberately manufactured the circumstances giving rise to this suit.

Field operates a web site at http://www.blakeswritings.com where he posts his "Writings." *See* Complaint ¶ 5. The works that form the basis for his complaint include such titles as "Antiperspirant," "Filthy Comforter," and "Dogbait," – works that can hardly be considered creative expression. *See* First Amended Complaint Exhibit A.[2]

According to publicly-available "WHOIS" records, Field registered the "blakeswritings.com" domain name on January 14, 2004.[3] He registered supposed copyrights in his "Writings" on January 16, 2004. *See* First Amended Complaint ¶ 7. Field then purchased advertising from Google, presumably in an effort to cause Google's automated search technology to index and cache the pages on his site.[4] *See* Google's Counterclaims ¶¶ 10-25. Field purposefully failed to follow the simple, well-known procedure to exclude his pages from the Google index and cache. *Id.* Google's automated technology performed as Field expected and desired and included his pages within the Google index and system cache. *Id.* Without requesting that Google remove his pages from the cache, Field filed this action claiming that Google infringed the copyright in one of his "Writings." *Id.* He then amended his Complaint to allege

[2] Field's "work" entitled "Antiperspirant" begins as follows: "It's a fact that I sweat like it's my job. And it's also a fact that there is no antiperspirant on planet Earth than [sic] can stop the walking sweat tsunami that I am, particularly my arm pits. During the summer and times of stress, the [sic] pour out. And I mean they pour." *See* http://www.blakeswritings.com/Antiperspirant.html (Sept. 2, 2004).

[3] Available at http://www.networksolutions.com/en_US/whois/index.jhtml.

[4] As of August 30, 2004, Field's AdWords advertising campaign cost him a total of $0.86. According to Google's records, Field's proposed AdWords text reads: "Brilliant Short stories -- Know entertainment like you've never known before -- www.blakeswritings.com."

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infringement of fifty more "Writings." *See* First Amended Complaint. Field seeks $50,000 in statutory damages for each "Writing" Google included in the cache. *Id.*

In its answer and counterclaims, Google detailed Field's machinations. It asserted numerous, meritorious defenses to Field's claims, and asked the Court to declare that Google's caching of Field's "Writings" was not actionable. Rather than join the issue he manufactured, however, Field has instead sought to delay the action by moving to strike Google's affirmative defenses and counterclaims.

III. ARGUMENT

A. Courts Disfavor Motions To Strike.

Federal Rule of Civil Procedure 12(f) ("Rule 12(f)") provides, in relevant part, that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." In practice, courts disfavor motions to strike because they are a harsh remedy, they are often used as delaying tactics, and they do not serve to further the case:

> Federal courts generally disfavor motions to strike. *Colaprico v. Sun Microsystems, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991) ("[M]otions to strike should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation."); *United States v. 729.773 Acres of Land, More or Less, Situate in City and County of Honolulu*, 531 F. Supp. 967, 971 (D. Haw. 1982) ("A motion to strike is a severe measure and it is generally viewed with disfavor."); *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1478 (C.D. Cal. 1996) ("[M]otions are generally disfavored because they are often used as delaying tactics, and because of the limited importance of pleadings in federal practice.") (cites and quotes omitted).

See Germaine Music v. Universal Songs of Polygram, 275 F.Supp.2d 1288, 1299 (D. Nev. 2003).

The allegations of the complaint should be construed favorably to the pleader. *See De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978) ("In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

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The aspects of Google's answer and counterclaim that Field seeks to strike are properly pled. Accordingly, Field's motion to strike should be denied.

B. Plaintiff's Motion To Strike Is Without Merit.

1. Google Properly Denied Paragraph 7 Based On Lack Of Knowledge.

Paragraph 7 of Plaintiff's First Amended Complaint provides:

> 7. Plaintiff is the sole owner of the registered copyrights in 51 original literary works ("the works"). Those registrations have an effective date of January 16, 2004. A listing of the works and their respective registration numbers is attached hereto as Exhibit A.

See First Amended Complaint ¶ 7. Google answered that it "is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7, and on that basis denies the allegations therein." *See* Google's Answer ¶ 7.

Plaintiff asserts, incorrectly, that this information is within the public record, citing www.copyright.gov. In fact, the cited web site does not provide sufficient evidence for Google to admit Paragraph 7 from Plaintiff's First Amended Complaint. While registrations may identify copyrights originally claimed and registered to "Blake A. Field," they do not allow Google to determine that Plaintiff currently owns and is the "sole" owner of the copyrights as he claims in his complaint (or, even, that Plaintiff is the same Blake A. Field who registered these copyrights). Likewise, the registrations do not permit Google to determine that the registrations cover "original literary works," as Field also alleges in Paragraph 7.

It was proper for Google to deny Paragraph 7 of Plaintiff's First Amended Complaint. Field's request to strike that denial is misguided.

2. Google's Answer To Paragraph 16 Is Proper.

Paragraph 16 of Plaintiff's First Amended Complaint provides:

> 16. Defendant does not seek authorization from copyright owners prior to reproducing and publicly distributing works stored in Google's cache.

See First Amended Complaint ¶ 16. Google answered as follows:

> 16. In response to the allegations in Paragraph 16, Google avers that it has the authorization necessary, if any, to operate its system cache, but otherwise denies the allegations in Paragraph 16.

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See Google's Answer ¶ 16.

Plaintiff contends that Google improperly "avers" facts with its answer. The authority cited by Plaintiff – Rule 8(b) and *Metropolitan Life Insurance Company v. Przybil* – does not support his contention. Plaintiff's allegation that Google "does not seek authorization from copyright owners" assumes that Google needs "authorization" from copyright owners. In response, Google clarified that it has the "authorization" necessary, if any, to operate its system cache. Google then "otherwise denie[d] the allegations of Paragraph 16." *See* Google's Answer ¶ 16. Nothing in Rule 8(b) or *Metropolitan Life* precludes such an answer.[5] Further, Field is simply wrong in asserting that Google failed to specifically deny the allegations of Paragraph 16, ignoring the fact that Google "otherwise denies the allegations in Paragraph 16."

Google's response to Paragraph 16 is proper. Field cannot justify striking it.

3. Google's Answer To Paragraph 26 Is Proper.

Paragraph 26 of Plaintiff's First Amended Complaint provides:

> 26. Until it received notice of the original Complaint in this action, Defendant maintained exact copies of each of Plaintiff's works in the Google cache, despite clear notice of Plaintiff's copyright affixed to each of the works.

See First Amended Complaint ¶ 26. Google denied the allegations of Paragraph 26. *See* Google's Answer ¶ 26.

Plaintiff contends that Google's denial of Paragraph 26 was improper in light of Google's admission, in response to Paragraph 29, that "at least one of the Writings within its system cache has been accessed by an Internet user or users." *See* Motion at 9-10; *see also* Google's Answer ¶ 29. In fact, there is no inconsistency between these two responses. Paragraph 26 contains a number of related assertions – that Google maintained "exact copies" of all of Plaintiff's works, that Google did this from some unspecified time until it received notice from Plaintiff, and that Google did this despite "clear notice" of Plaintiff's copyright affixed to each of the works. Google properly denied Paragraph 26 in light of the related contentions.

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[5] In *Metropolitan Life*, the defendant failed to "admit, deny or state that [the defendant] lacks sufficient knowledge or information to form a belief as to the truth of the averments." *See Metropolitan Life Ins. Co. v. Przybil*, 2002 U.S. Dist. LEXIS 22756, at *4 (N.D. Ill. Nov. 19, 2002). Google's response, by contrast, denies the allegations at issue.

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Paragraph 29, by contrast, refers to a particular work and does not contain the temporal limitations (*e.g.*, the implication that Google maintained copies continuously for an undefined period of time) or causal limitations (*e.g.*, that Google maintained copies despite the clear copyright notice) found in Paragraph 26.

Google's response to Paragraph 26 is proper. Field's request to strike that response is misguided.

4. Google's Counterclaims Are Proper.

Google's counterclaims ask the Court to declare that, to the extent Google's system cache includes Field's works, Google (a) is immune from copyright infringement liability under the safe harbors of the Digital Millennium Copyright Act; (b) is engaged in a fair use of Field's works; and/or (c) is impliedly licensed to Field's works. There is undoubtedly an actual controversy between the parties on these issues. Accordingly, Google is entitled to pursue declaratory relief.

Plaintiff seeks to strike Google's counterclaims based on the incorrect assertion that they are redundant with Google's affirmative defenses.[6] In fact, counterclaims and affirmative defenses are different. *See, e.g.*, *Motionless Keyboard Co. v. Microsoft Corp.*, No. Civ. 04-180-AA, 2004 WL 1274401, at *1 (D. Or. June 9, 2004) ("An affirmative defense is simply asserted to defend against plaintiff's claims; a counterclaim seeks specific relief."); *see also Cardinal Chemical Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 93-94 (1993) ("An unnecessary ruling on an affirmative defense is not the same as the necessary resolution of a counterclaim for a declaratory judgment.").

Google's affirmative defenses are merely defenses to Plaintiff's claims for relief. If Field chooses to dismiss his current claims against Google, Google's affirmative defenses will also be dismissed. Likewise, if Field's charges of infringement fail because of some copyright formality (*e.g.* invalidity, lack of originality), or because he cannot establish a prima facie case of infringement, Google's affirmative defenses would be moot. Google could thus face future

6 Ironically, Field also seeks to strike all of Google's affirmative defenses. *See, infra,* at p. 8.

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claims of infringement from Field on the same or other works. Indeed, Field has already demonstrated a seriatim approach to his infringement claims in this litigation.

Through its counterclaims for declaratory relief, Google seeks to obtain an unambiguous declaration that the standard operation of its system cache does not support a claim of copyright infringement by Field.[7] As Wright and Miller make clear, under these circumstances, "the safer course for the court to follow is to deny a request to dismiss a counterclaim for declaratory relief unless there is no doubt that it will be rendered moot by the adjudication of the main action." Wright & Miller, 6 Fed. Prac. & Proc. Civ.2d § 1406; *see also Alvater v. Freeman*, 319 U.S. 359 (1943) (defendant in patent case may counterclaim for declaration that patent is invalid even though issue of validity was likely to be litigated in plaintiff's affirmative case; important issue of validity may not otherwise be reached); *Leach v. Ross Heater & Mfg. Co.*, 104 F.2d 88 (2d Cir. 1939) (same); *England v. Deere & Co.*, 158 F. Supp. 904 (D. Ill. 1958) (same). Accordingly, Field's motion to strike Google's counterclaims should be denied.

5. Google's Affirmative Defenses Are Proper.

Plaintiff seeks to strike *all* of Google's affirmative defenses based on the bald assertion that Plaintiff has not received sufficient notice of Google's affirmative defenses from the pleadings. However, Plaintiff only specifically addresses *one* such affirmative defense – estoppel – when arguing that he has not been provided with sufficient notice. *See* Motion at 8-9.

Plaintiff cannot seriously contend that he was not put on notice of Google's estoppel defense. For example, the grounds for estoppel – *e.g.*, that Field posted the Writings on his web site and affirmatively sought to have the writings included in the Google system cache – are

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[7] The one case cited by Plaintiff – *Grokster* – is not binding on this Court and should not be followed. In *Grokster*, the Central District of California rejected the defendant's "specious" justification for declaratory relief – that it would establish for the world that the plaintiff's copyright was unenforceable against anyone, noting that the Declaratory Judgments Act is not intended to provide a forum for establishing the legal relations between declaratory defendants and the world. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 269 F. Supp. 2d 1213, 1225-26 (C.D. Cal. 2003). In this case, Google seeks declaratory judgment with respect to Plaintiff's allegations of infringement against Google. There is nothing improper or redundant in asserting affirmative defenses and also seeking declaratory relief.

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clearly set forth in the general allegations supporting Google's counterclaims. *See* Google's Counterclaims ¶¶ 10-17, 24-25.[8]

Field has failed to mention Google's other affirmative defenses, much less explain any alleged deficiency or failure to provide fair notice with respect to these defenses. *See* Motion at 8-9. More importantly, Google did set forth sufficient information to provide Plaintiff with notice of all of its affirmative defenses. *See, e.g., Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999) (acknowledging that merely pleading the name of an affirmative defense may be sufficient). And Google detailed the factual underpinnings for each of its affirmative defenses in its counterclaims. *See* Google's Counterclaims ¶¶ 5-25.

The factual basis for Google's affirmative defenses is set forth in Google's answer and counterclaims, and Plaintiff cannot seriously contend to be ignorant of it. Accordingly, Field has not met his burden with respect to his overreaching request to strike any, much less all of Google's affirmative defenses.[9]

6. Google's Eighth And Tenth Affirmative Defenses Are Proper.

Google's Eighth Affirmative Defense Alleges: "Plaintiff's claims are barred because of his contributory fault." *See* Google's Answer ¶ 47. Its Tenth Affirmative Defense Alleges: "To the extent that Plaintiff suffered any damage or injury, which Google expressly denies, he failed to take the necessary steps to mitigate the damage or injury sustained." *See* Google's Answer ¶ 49.

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[8] Field's reliance on *Qarbon.com, Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1049 (N.D. Cal. 2004) is badly misplaced. In *Qarbon*, the court found that a defendant's allegation of "estoppel" in a patent case was inadequately pled because it was not clear what type of estoppel the defendant was asserting – *e.g.*, prosecution history estoppel or equitable estoppel. However, since this case is not a patent infringement action like *Qarbon*, there is no possibility of confusion between "prosecution history estoppel" (a defense applicable in patent but not copyright cases) and the equitable estoppel upon which Google relies.

[9] To the extent that the Court believes that Google needs to amend one or more of its affirmative defenses to provide additional information, Google should be granted leave to do so. *See Schreiber Dist. v. Serv-Well-Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (unless "allegations of other facts consistent with the challenged pleading could not possibly cure the defect," leave to amend should be granted).

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Plaintiff contends that these are improper affirmative defenses because contributory fault has never been recognized as a defense in a copyright case, and because Plaintiff is seeking statutory damages, which Plaintiff asserts "are set by statute and are not related to any circumstances under the control of Plaintiff." *See* Motion at 8. Field misapprehends the statutory damages analysis.

The Court has wide discretion in fixing an amount for statutory damages and must consider the specific facts of the case, including the circumstances of infringement in determining the amount of damages to be awarded. *See F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952); *see also Peer Int'l Corp. v. Pausa Records*, Inc., 909 F.2d 1332, 1336 (9th Cir. 1990). The fact that Field affirmatively sought to include his works in Google's index and cache and then failed to request their removal from the cache is certainly relevant to any statutory damages analysis the Court may theoretically undertake at some point in the case. Thus, Field's own contributory fault and failure to mitigate are properly pled as affirmative defenses, and Field's motion to strike them should be denied.

IV. CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court deny Plaintiff's motion to strike in its entirety. Should the Court believe any portion of the motion has merit, however, Google requests leave to amend its answer and counterclaims as necessary.

Dated: September 7th, 2004

SNELL & WILMER L.L.P.

By: [signature]

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CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing GOOGLE INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S COUNTERCLAIMS AND PORTIONS OF DEFENDANT'S ANSWER was served this 7th day of September, 2004, by placing same in the United States mail, postage prepaid, addressed to the following:

Blake A. Field
3750 Doris Place
Las Vegas, NV 89120
Pro Se Plaintiff

Judith B. LaWalter
An employee of Snell & Wilmer, L.L.P.

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Attorneys for Defendant GOOGLE, INC.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BLAKE A. FIELD, Plaintiff, vs. GOOGLE, INC., Defendant.	No. CV-S-04-0413-RCJ-LRL **DECLARATION OF ALEXANDER MACGILLIVRAY IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S COUNTERCLAIMS AND PORTIONS OF DEFENDANT'S ANSWER**
AND RELATED COUNTERCLAIMS.	

I, Alexander Macgillivray, hereby declare:

1. I am employed by Defendant Google Inc. ("Google") as Intellectual Property Counsel. The following facts are true of my own personal knowledge and if called and sworn as a witness I could and would testify competently to them.

2. Google maintains an online index of web sites and other content, which it makes available for free to anyone with an Internet connection. Its automated search technology helps

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people obtain nearly instant access to relevant information from a vast online index. To create this index, Google's search technology "crawls" the World Wide Web ("Web"), visiting web pages to which other pages are "linked." Google copies these pages and analyzes their content so that it can properly locate the page within its index. When a user queries the index, Google returns a Search Results Page containing links to (and excerpts from) those pages it believes are relevant to the user's query.

3. Google's Search Results Pages often also include links to saved or "cached" copies of the pages it analyzed when it last crawled those web pages. The cached versions of pages can serve a variety of functions for users. For example, the cached version of a page is available to users through Google even if, due to technical problems, the original page cannot be accessed over the Internet. Google's offering of access to the cached versions of the indexed sites thus helps improve access to content on the Internet. The cached version of a page also provides an archival view of pages as they existed at the time Google's search technology last analyzed them. Thus, the cached versions can be used to identify changes made to the pages since Google most recently crawled them. This is not an exhaustive list of the many purposes that can be served by Google's system cache. The examples are offered merely to provide illustration.

4. Since it began operating roughly five years ago, Google has respected relevant Internet standards concerning its operation of its system cache feature. In particular, if a web site makes clear that it does not wish to have its pages included in Google's cache by coding the pages using a well-known "metatag" recognized by automated "crawlers," Google will not make the pages accessible through its cache. The procedure for preventing access to a page through Google's cache is set forth on Google's web site at http://www.google.com/webmasters/3.html#B2. Google also promptly removes access to pages though Google's cache upon request of the page owner. http://www.google.com/remove.html#uncache.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

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Executed this 7th day of September, 2004 in Mountain View, California.

Alexander Macgillivray

Snell & Wilmer
L.L.P.
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CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing DECLARATION OF ALEXANDER MACGILLIVRAY IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S COUNTERCLAIMS AND PORTIONS OF DEFENDANT'S ANSWER was served this 7th day of September, 2004, by placing same in the United States mail, postage prepaid, addressed to the following:

Blake A. Field
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Pro Se Plaintiff

Judith B. Warren
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